In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA, *plaintiff in error,*
v.
A. Z. HUTTO, J. R. WHITE, RAY SEE, *and* J. R. RICKS.
No. 691.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The writ of error in this case (R. 16) is under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, and brings up for review a judgment (R. 13) of the District Court for the western district of Oklahoma, sustaining a demurrer (R. 9) to an indictment (R. 2–6) under §37 of the Penal Code for conspiracy to violate §2078 of the Revised Statutes which provides:

> No person employed in Indian affairs shall have any interest or concern in any trade with the Indians, except for, and on account of, the United States; and any person offending

herein, shall be liable to a penalty of five thousand dollars, and shall be removed from his office.

The indictment charges that one Hutto was a duly appointed and qualified Indian farmer for the Tonkawa Tribe of Indians on the Ponca Reservation in Oklahoma, and by virtue of the Acts of Congress and the rules and regulations promulgated by the Secretary of the Interior was charged with the duty to superintend and direct farming among the said Indians, to supervise the leasing of Indians lands, and to appraise their value for sale. That during the time he was such Indian farmer and within the jurisdiction of the court he, J. R. White, Ray See, and J. R. Ricks did feloniously conspire and agree together and with each other that the said Hutto while so employed in Indian affairs should have an interest and concern in sales of lands by the Indians, and in the purchase of automobiles and other commodities of said Indians, not for or on account of the United States, in violation of § 2078 of the Revised Statutes, and as a part of such conspiracy these parties agreed that they would induce and procure certain members of the tribe therein named to sell their lands, purchase automobiles and other commodities, to borrow and lend money, and that said Hutto should have an interest and profit in said sales, purchases and loans.

Overt acts are charged in three counts. The first count charges that in pursuance of this con-

spiracy Hutto, See and White solicited and induced David Williams, a member of the Tonkawa Tribe of Indians, to sell certain lands for the inadequate consideration of $3,750.00, and in further pursuance of the conspiracy said White and See paid said Hutto $250 of the consideration paid for said land for services in procuring the consent of the Indian to the sale thereof.

The second count charges a conspiracy between Hutto and Ricks to procure the sale of certain land of Joe Marcus Jessie, an Indian of said tribe, for an inadequate consideration, and in further pursuance of said conspiracy said Ricks paid said Hutto a portion of the consideration paid for said land, to-wit, $150.00, for services in procuring the consent of the Indian to the sale.

The third count charges a conspiracy between said Hutto and White to induce Railroad Cisco, a Tonkawa Indian, to mortgage and convey to J. R. White a certain tract of land, for an inadequate consideration, and in pursuance of said conspiracy said White paid said Hutto a portion of said consideration, the exact amount of which is unknown, for services in procuring the consent of the Indian to the sale, and that later on and in pursuance of the conspiracy said Hutto and White induced the Indian to convey the land to one Thomas Sheets, and said White and Sheets paid to Hutto $150.00 of the consideration for said land for services in procuring the consent of the Indian thereto.

Each of the defendants demurred to the indictment upon the following grounds (R. 7–10):

1st. That said information does not substantially conform to the requirements of the statutes and laws of the United States.

2nd. That the facts charged and the allegations in said indictment are not sufficient to charge the commission of a public offense.

3rd. That the allegations and facts set out in said indictment are not sufficient to charge this defendant with a public offense.

4th. That the indictment is not direct and certain in regard to the particular offense therein sought to be charged.

5th. That the indictment is not direct and certain in regard to the particular offense intended to be therein charged against this defendant.

6th. That the indictment is not direct and certain in regard to the particulars, the facts, and the circumstances of the offense charged, although such facts, particulars, and circumstances are necessary to constitute a complete offense.

7th. That the acts alleged to constitute the offense set out in the indictment are not clearly and distinctly set forth in ordinary and concise language and in such manner as to enable a person of common understanding to know what is therein intended.

8th. That neither the act charged as constituting the offense set out in the indictment nor are the allegations in the indictment stated with that degree of certainty which

> would enable a court to pronounce judgment according to the right of the cause or to protect the defendant in bar of another prosecution or action thereupon nor upon some of the offenses included within the general charge.

The District Court on November 3, 1919 (R. 11), sustained the demurrers to the indictment and ordered that the cause be submitted to the next grand jury and the defendants held upon their present bonds, to which ruling plaintiff excepted.

On November 17, 1919 (R. 12), plaintiff filed a motion for a new trial, and on November 29, 1919 (R. 13), the court vacated the order theretofore entered sustaining the demurrers to the indictment and reinstated the demurrers and bonds of the defendants. But on December 7, 1920, the demurrers were reargued and submitted and the court sustained the demurrers in the following language (R. 13):

> On this seventh day of December, 1920, the separate demurrers to the indictment herein are reargued and submitted, and the court being fully advised, it is
>
> Ordered, that said demurrers be, and they are, sustained, upon the ground that section 2078 of the Revised Statutes is held inapplicable to transactions involving lands or other property with respect to which the Government has no interest or control, and no such interest or control is alleged in the indictment.

Jurisdiction of this court.

The Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, provides:

> That a writ of error may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to-wit:
>
> From a decision or judgment quashing, setting aside, or sustaining a demurrer to any indictment or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded.

It appears from the order sustaining the demurrer to the indictment that it is based upon a construction of §2078 of the Revised Statutes that it does not apply to prosecutions involving lands or other property with respect to which the Government has no interest or control. The jurisdiction of this court is therefore directly invoked by this writ of error.

Specifications of error.

The errors alleged in the assignment (R. 14) may be reduced to one, namely:

> Error in ruling that section 2078 of the Revised Statutes is inapplicable to prosecutions involving lands or other property with respect to which the Government has no interest or control, and sustaining the separate demurrers to the indictment because no such interest or control was alleged therein.

ARGUMENT.

The want of interest in or control over the property involved does not take the transaction out of the inhibition of the statute.

The plain purpose of the statute is to inhibit a person employed in Indian affairs from having an interest in any trade not for and on account of the United States, with any Indian irrespective of whether the United States has any interest in or control over the property involved in the transaction.

It is difficult to perceive any reason for the action of the court below in sustaining the demurrer on the ground that the United States had no interest in or control over the land or money involved. The court seems to have fallen into the error of holding that the object of the statute was to protect government-owned or government-controlled property, whereas its purpose was to prevent the Government's own agents from over-reaching its wards, and not to allow those employed for the protection and civilization of the Indians to be tempted to the certain fraud and unconscionable conduct resulting from an interest in trades with its wards. This plain interpretation of the statute would seem to need neither argument nor citation to support it, but it is supported by the genealogy of the statute in question and by similar legislation, as well as by reason and authority.

In *United States* v. *Douglas*, 190 Fed. 482, the Court of Appeals considered § 2078, R. S. This was an action brought by the Government to recover the $5,000 penalty thereunder against a school

teacher employed for the Crow Creek Indians who had purchased from the Indians on the reservation cattle branded "I. D." It was contended in that case that while the statute prohibited sales to the Indians by such an employe, it did not forbid purchase from the Indians. In holding that the statute forbids purchases from and sales to the Indians by persons employed in Indian affairs, the various laws enacted by Congress prohibiting persons from trading with the Indians without licenses, and prohibiting employes of the Indian Department from trading with the Indians, are reviewed. The court points out in this case that if the Indian school teacher was a member of the tribe of Indians from whom she purchased the cattle she might have lawfully made the purchase were it not for the fact that by reason of her also being a government employe she was prohibited from so doing. In discussing this proposition the court very pertinently said (p. 490):

> There was nothing in this act to indicate a purpose on the part of Congress to authorize the government's own agents, placed in a controlling position to use that position, to overreach its wards. All the statutes relied upon as bearing on the construction of the word "trade," and many others, have been carefully considered; but none of them have any tendency to show that the word "trade" was used in the act in question in any other than its usual and ordinary sense.
>
> The government in its capacity as quasi-guardian ought not to allow its agents to be

> tempted to overreach its wards. A schoolmaster placed by the government among a people under tutelage might well be expected to wield a large influence, and it is revolting that this influence should be used to subserve self-interest in barter with those who are the subject of wardship. We sustain a trust relation with the Indians imposed by the laws of the land, if not by an even higher law; and when Congress, recognizing this, forbade its agents to trade with the Indians, no strained effort should be made to construe trade in some unusual way, so as to include only sales to the Indians, and not purchases from them, when it is a matter of common knowledge that there would be more danger of the Indians improvidently parting with their property than of their improvidently acquiring new property.

On June 30, 1834, Congress passed two Acts which together make provision for the organization of the Indian service, and for trading between the Indians and the Government and between the Indians and outsiders under government supervision. The first Act "To regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," is in 4 Stat. 729, c. 161, and the second, "An Act to provide for the organization of the department of Indian affairs," is in 4 Stat. 735, c. 162.

Section 2 of the first Act prohibits any person from trading with the Indians without a license from the superintendent of Indian Affairs. Section 4 provides a penalty for an attempt by a person other than an Indian, residing in the Indian country as a

trader, or to introduce goods, or to trade therein, without a license. Section 7 prohibits any person other than an Indian within the Indian country from purchasing or receiving of an Indian in the way of barter certain specified necessaries except skins or furs.

It will be observed that the Government has no interest in any of the property involved in the transactions enumerated above as forbidden by this Act.

Section 14 of the second Act provides:

> That no person employed in the Indian department shall have any interest or concern in any trade with the Indians, except for, and on account of, the United States; and any person offending herein, shall forfeit the sum of five thousand dollars, and upon satisfactory information of such offence being laid before the President of the United States, it shall become his duty to remove such person from the office or situation he may hold.

This section, with an immaterial change in the language, became §2078 of the Revised Statutes.

On June 30, 1834, the Government did not hold the personal property of the Indians in trust and had no interest therein. It is clear then that Congress in inhibiting persons employed in Indian affairs from trading, not for and on account of the United States, with the Indians, manifestly had in mind property other than that over which the Government had control or in which it had some interest.

Under these two Acts of June 30, 1834, all trade or business in connection with property in which the Government had an interest was to be conducted directly with the Government authorities. Trading any other property with the Indians was allowed to be conducted only under proper license between the Indians and persons not connected with the Government, and §14 of the Act (4 Stat., p. 738) providing for the organization of the department of Indian affairs, as we have seen, expressly prohibited any person in the Indian service from having any interest in or trade with the Indians except for and on account of the Government. While employes could and did transact business for the Government in connection with the property in which it had an interest, they were expressly forbidden from conducting any business with the Indians in which the Government had no interest unless such employe acted for and on behalf of the Government.

As pointed out by the Circuit Court of Appeals in *United States* v. *Douglas*, *supra*, the Government in its capacity as quasi-guardian did not allow its agents to be tempted to overreach its wards and its employes placed among people under tutelage were expected to wield a large influence. It would be revolting that this influence could be used to subserve self-interest in barter with those who are the subject of wardship.

The Act of April 18, 1796, 1 Stat. 452, c. 121, "An Act for establishing trading houses with the Indian tribes," authorized the President (§ 2) to appoint an agent for each trading house and required such agent to take an oath or affirmation that he would not, directly or indirectly, be concerned or interested in any trade, commerce or barter with any Indian or Indians whatever, but on the public account, and further required he should give bond for sufficient security to perform all the duties required of him by the Act. Section 3 provided that the agents, their clerks, or other persons employed by them, should not be directly or indirectly concerned or interested in carrying on the business of trade or commerce, on their own, or any other than the public account.

This early law cannot fairly be construed as applying only to trade or barter in property in which the Government had an interest. So, also, in the Act of March 2, 1811, 2 Stat. 652, c. 30, being "An Act for establishing trading houses with the Indian tribes," superintendents, agents and all other employes of the Indian Department are prohibited from being concerned directly or indirectly from carrying on trade or commerce in any of the goods bought for or supplied to or received from the Indians, and it is provided that none of these persons shall be concerned or interested in carrying on the business of trade or commerce on their own or any other than the public account. This was the Act considered

by the Court of Appeals in *United States* v. *Douglas*, and in reference thereto the court said (p. 488):

> In section 6 it emphasized that the trading houses were to be places for acquiring from the Indians such property as they had to dispose of by sale or barter, as well as to dispose of goods to the Indians, by providing:
>
> "That the superintendent of Indian trade, the agents, or their clerks, or other persons employed by them shall not be directly or indirectly concerned or interested in carrying on trade or commerce in any of the goods or articles bought for, or supplied to, or received from the Indians."
>
> This amounted to substantially an express declaration that one of the purposes of trading houses was to acquire property by barter or purchase from the Indians; but, not satisfied with prohibiting the government employes from competing with the government in its trade either of sale or purchase, the same section further provided that:
>
> "The said agents, assistant agents, or any persons employed by them, shall not be directly or indirectly concerned or interested in carrying on the business of trade or commerce, on their own or any other than the public account."
>
> The latter provision can only have one interpretation. Having already prohibited the government employe from being concerned in trade in articles bought for, supplied to, or received from the Indians, the second prohibition can only have been intended to pro-

hibit the government agents from being concerned in the business of trade in articles not bought for, supplied to, or received from the Indians by the government.

As shown above § 6 of the Act of March 2, 1811, contains two provisions, the former prohibiting trade in articles sold to or bought from the Indians, and the latter prohibiting trade or commerce generally with the Indians, and this latter provision is the one carried into section 2078 of the Revised Statutes. The inference from this is irresistible that Congress was not satisfied in prohibiting merely trade in articles in which the United States had an interest, but sought to prohibit all trade between Indian employes and these Indian wards.

We have been able to find but one other reported decision in which §2078, R. S., has been considered by the courts. This is the case of *Blue Jacket* v. *Ewert*, 265 Fed. 823. In this case the defendant, Ewert, was appointed by the Attorney General of the United States as a Special Assistant to the Attorney General "to assist in the institution and prosecution of suits to set aside deeds made to certain allotments in the Quapaw Indian Agency." A certain allotment of land had been made to Charles Blue Jacket, Quapaw Indian, who died during the period of restriction, leaving the plaintiffs among his heirs at law. The inherited lands of Blue Jacket were offered for sale under the rules established by the Secretary of the Interior and were properly advertised and appraised. Ewert bid upon said land and his bid was

accepted by the Indians, and both the sale and the deed approved by the government. The defendant claimed he was not employed in Indian affairs and that he was not engaged in any trade with the Indians, but was dealing with the United States. The court held that as a special assistant to the Attorney General assisting in the institution and prosecution of suits to set aside deeds to certain allotments in the Quapaw Indian Agency he was employed in Indian affairs, and that his claim that he was not dealing with the Indians ignored the fact that the Indians, in deciding whether to refuse or accept Ewert's bid and in executing the deed to him as grantee, may have signed it because of confidence in his official position and his relation to the Indians.

In discussing the purposes of the statute, the court said in substance that one purpose was to prevent the possible play of official influence over the mind of the Indians, and another was "to preserve loyalty, or at least disinterestedness towards the Indian's interest by those employed in Indian affairs." The opinion further pertinently points out that if it were held that the statute did not apply to a trade between an official of the Indian Department and the Indians, except where the Indian knew he was dealing with an employe, a way would be open for the employes of the Indian Department to take advantage of their knowledge of Indian affairs and of their needs, to make purchases or sales for their own benefit through third persons, agents and corporations, and that such a construction would be contrary

to the practical interpretation that has been placed upon this statute by the Indian department ever since its enactment. This case in now on appeal in this court as *Ewert* v. *Blue Jacket*, No. 624.

There is not a word in any of the earlier or later statutes on this subject which by any reasonable interpretation or inference can be taken to indicate any purpose on the part of Congress to limit to transactions involving government-owned or government-controlled property the inhibition against persons employed in Indian affairs from dealing to their advantage with the Indians. The high duty to protect these Indians protests against such a narrow construction, and conscience instinctively revolts at an interpretation of the law which would leave these wards of the nation to be the prey of the unscrupulous government employe, and would subject the well meaning employe to the temptation to overreach and defraud these dependent peoples.

CONCLUSION.

The judgment of the court below should be reversed and the case remanded for further proceedings.

LESLIE C. GARNETT,
Special Assistant to the Attorney General.

MARCH, 1921.

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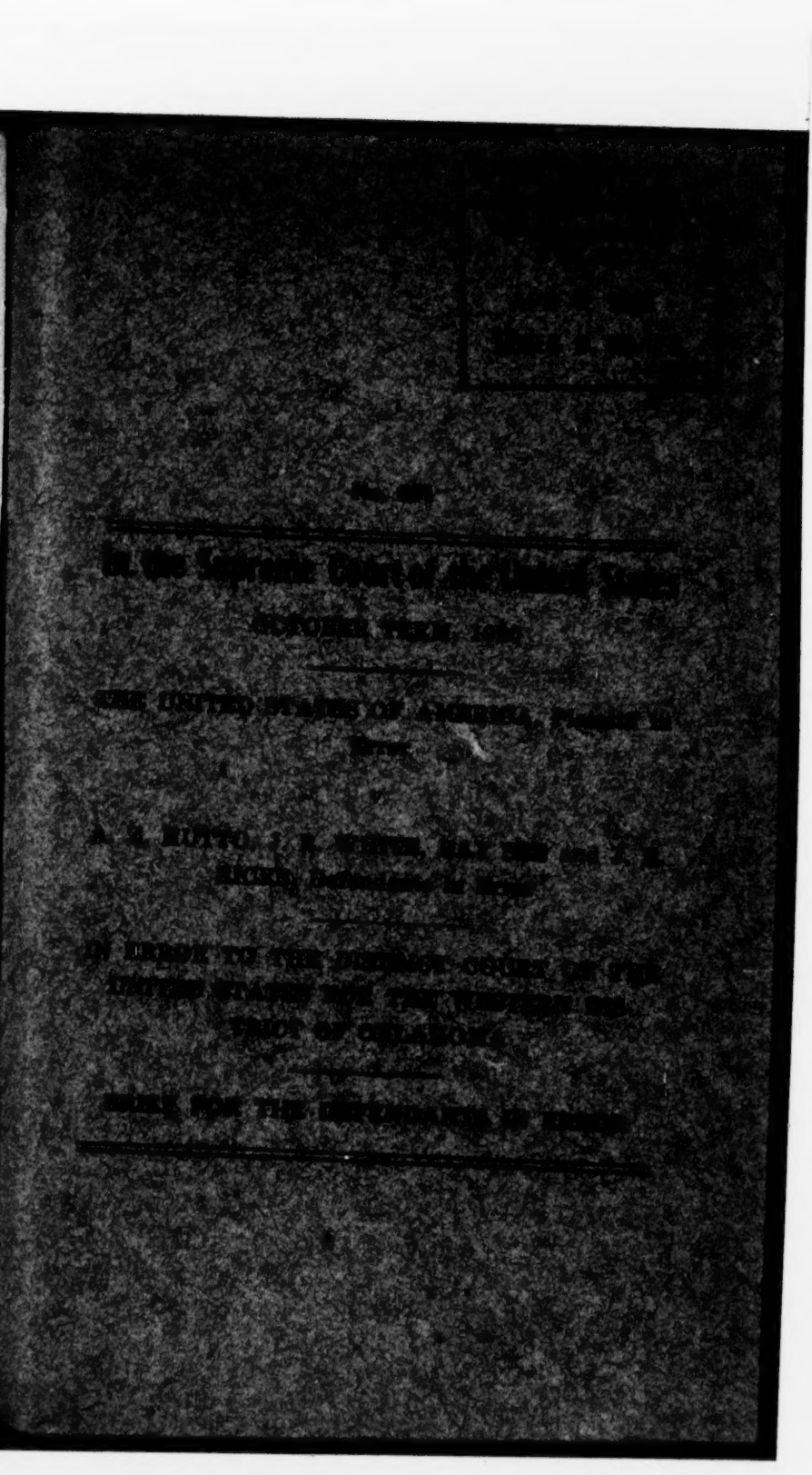

In the Supreme Court of the United States

OCTOBER TERM, 1920

THE UNITED STATES OF AMERICA
Plaintiff in Error,

v.

A. Z. HUTTO, J. R. WHITE, RAY SEE and J. R. RICKS.

No. 691

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

BRIEF FOR THE DEFENDANTS IN ERROR

STATEMENT

In addition to the statement made by the United States (R. 5-6) relative to the sustaining of the demurrer by the court on the 3rd day of November, 1919, we desire to add that the court sustained the demurrer on the 3rd day of November on the ground that the indictment would not lie for the reason that section 2124 of Revised Statutes provides for the

recovery of the penalty as set out in section 2078 Revised Statutes, in a civil action only; section 2124 Revised Statutes being as follows towit:

> "All penalties which shall accrue under this Title shall be sued for and recovered in an action in the nature of an action of debt, in the name of the United States, before any court having jurisdiction of the same, in any State or Territory in which the defendant shall be arrested or found, the one-half to the use of the informer and the other half to the use of the United States, except when the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use."

That on November 17th, 1919, the court vacated its order sustaining the demurrer to the indictment on the grounds that the indictment would not lie and that the penalty must be recovered by civil action, and on December 7th, 1920 sustained the demurrer on the ground as set out in the brief of the United States at page 5.

ARGUMENT

The theory and position of the Appellees was, in the lower court, and is now, that the indictment is bad and the demurrer should have been sustained.

First, all penalties under the title of Indians beginning with section 2039 and ending with section 2157, Revised Statutes of the United States, shall be recovered in a civil action, as provided under section 2124 Revised Statutes, supra:

Second, that section 2078 Revised Statutes applies only to Indians who are wards of the government and whose lands are restricted and does not apply to Indians who have received their competency papers and Indians who have received patents to their land; and,

Third, that the indictment for conspiracy must charge some act that has been made a crime by the laws of the United States or an act made to defraud the United States and must state the act intended to be carried out by agreement of the parties so that it can be seen that the objects of the conspiracy was a crime against the United States or to defraud the United States.

The indictment as set out in the abstract (R. pp. 2-3-4-5-6) does not comply with any of the foregoing reasons, as argued in the lower court and which will be argued here, for which the demurrer to the indictment should have been sustained.

As to the first proposition, section 2148 Revised Statutes is as follows:

"If any person who has been removed from the Indian Country shall thereafter at any time

return or be found within the Indian country, he shall be liable to a penalty of one thousand dollars."

The foregoing section is synonymous with section 2078 Revised Statutes, as to punishment, each providing for a penalty in dollars.

In case of the United States v. Payne et al, 22 Fed. 426 the court said:

> "A conspiracy to make settlement on Indian land and to return to the Indian country after being removed therefrom is not an indictable offense, within the meaning of the conspiracy clause of chapter eight, Supp. Revised Statutes 484. The proper proceedings in such case is by action under Revised Statutes section 2124, to recover the penalty prescribed for such offense."

Section 2124 Supra, your Honors will note, reads specifically "that all penalties which shall accrue under this title (meaning Indians) **shall be** sued for and recovered in an action in the nature of an action in debt in the name of the United States," thus leaving no other alternative than a civil action in debt brought by the United States to recover all penalties accruing under the offenses committed under the title of Indians, including section 2078.

In the case of In Re Seagraves (Oklahoma Territorial Supreme Court then a Federal Court) (4

Oklahoma Reports 422), (48 Pac. 272) the court takes up the history of section 2148 and holds specifically that section 2124 applies to all penalties under the title of Indians and discharged the defendant on habeas corpus, holding that a civil action and a civil action only could be maintained. The history of section 2708 is parallel with the history of section 2148 and our contention is that section 2124 applies to all penalties under the title of Indians and that the statute provides that such action **shall** (not may or must, but shall) be a civil action commenced against the party committing the act, not only under section 2708 but all other sections under the title of Indians. If this is true then no crime has been committed and conspiracy can not lie and the indictment held good as a conspiracy to commit a crime, and there is no charge in the indictment that appellees were attempting to or did defraud the Government but alleges that the appellee did then and there willfully, knowingly unlawfulyy and feloniously combine, confederate, agree etc. (R p.3)

The indictment does not contain any allegation that the Indians with whom the transactions were made as alleged in the indictment were wards of the Government or that the land purchased or alienated by mortgage was restricted land, and until the indictment does so allege, the Indian, so far as the Government is concerned and so far as this offense

is concerned, would be the same as a white man; and an agreement with an Indian farmer to help the other defendants or appellees to buy or sell land or mortgage the same or buy or sell automobiles to white people, certainly would not be wrongful under section 2078 and therefore not wrongful at all, and if the Indian had received his competency papersand a patent to his land the fact that he was an Indian with Indian blood, certainly would not make the dealing with him through the Indian farmer, if true, an offense.

In the case cited by the United States in its brief on page 14 towit: Blue Jacket v. Ewert, 265 Fed. 823, at page 829 the court says.

> "The bill contains no allegation and the proofs afford no facts to take the case out of the ordinary rule and to make it equitable to allow its maintenance at this time, unless it be the fact that the plaintiffs were Indians. The adult plaintiffs were free to make convey ance of this land, even though they were Indians, and their tribal relation had been severed, and they were chargeable with the same diligence as white people in discovering and pursuing their legal remedy."

Now, if because the tribal relations are severed and the Indian is entitled to transfer his lands, he is chargeable with the same degree of diligence as the

white man, and the writer understands this to be the law, then if an Indian has received his competency papers and has become a competent Indian, and in addition to having received his land through tribal relations, has received a patent therefor and a right to deal the same as a white man not only with himself but with his property, owing the same in fee by patent and being no longer a ward of the United States, under what theory can it be found that a man working as an Indian farmer could be guilty of a criminal act for dealing with such an Indian? And if this is true, then until the indictment charges, which in this case it can not do, that the Indian was a ward of the Government and his land was restricted, a demurrer to the indictment, would be sustained. If the United States could make the allegation that the Indians were wards of the Government, over which they are now complaining and that the land had not been patented to the Indnans but was retsricted, then certainly they would have asked for a reindictment instead of appealing to the Supreme Court of the United States.

The cases cited by the United States are both civil actions and in the judgment of the writer, do not touch the case at bar but on the contrary carry out the theory of the appellees that unless the Indians are wards of the Governmetn or the property is restricted that section 2708 does not apply.

At page 11, brief of the United States, your Honors will note that counsel quote from the opinion of the court in the case of United States v. Douglas cited in their brief as follows:

"The Government in its capacity as quasi-guardian did not allow its agents to be tempted to over reach **its wards**, and its employees placed among people under Tutelage were expected to wield a large influence."

And again at pag 14, they say:

"The inference from this is irresistible (meaning section 2078) that Congress was not satisfied in prohibiting merely trade in articles in which the United States had an interest, but sought to prohibit all trade between Indian employees and these **Indian wards.**"

And on page 16 they say:

"The high duty to protect these Indians protests against such a narrow construction and conscience instinctively revolts at an interpretation of the law which would leave **these wards** of the nation to be the prey of the unscrupulous Government employee, and would subject the well meaning employee to the temptation to over reach and defraud these dependent peoples."

The theory of the United States being that these Indians must be wards. The indictent doesn't say

so; and an Indian who has received his competency papers is put on a level with the white people of the United States and when he deals with land that is patented after receiving his competency papers he is certainly in the same situation as the white man and placed beyond the position of where the United States Government can be defrauded, as they have placed him beyond their hands, individually, as well as his property with which he has a right to do as he pleases and over which the Government has no control.

The fact that the judge of the lower court only saw one reason to sustain the demurrer as set out in the Journal Entry, we trust will have no effect upon the affirming of the case, provided the demurrer to the indictment should have been sustained for the reasons set out in the Journal Entry or for other reasons, as argued in the lower court and as argued here.

CONCLUSION

Believing as we do, that the judgment of the lower court should be affirmed for the reasons herein set out, we respectfully submit the same, praying

an affirmance of the judgment of the lower court, and for the costs expended.

HENRY S. JOHNSTON,
Perry, Okla.
SAM K. SULLIVAN,
Newkirk, Okla.
Atty's for Appellees.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 692.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

A. Z. HUTTO.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

INDEX.

1 THE UNITED STATES OF AMERICA:

To A. Z. Hutto, greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States of America, in the city of Washington, District of Columbia, thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Oklahoma, wherein the United States of America is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said United States of America as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John H. Cotteral, judge of the District Court of the United States for the Western District of Oklahoma this 3rd day of January, A. D. 1921.

JOHN H. COTTERAL,
Judge of the District Court of the United States for the Western District of Oklahoma.

Due and proper service and the receipt of a copy of the within citation is hereby admitted and acknowledged this 4th day of January, A. D. 1921.

SAM K. SULLIVAN,
HENRY S. JOHNSTON,
Attorneys for Defendant (Appellee).

Filed Jan. 3, 1920. Arnold C. Dolde, clerk, by M. V. Haws, deputy. Re-filed Jan. 4, 1920. Arnold C. Dolde, clerk, by M. V. Haws, deputy.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable judges of the District Court of the United States for the Western District of Oklahoma, greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the special November term, 1920, thereof, between The United States of America, plaintiff, v. A. Z. Hutto, No. 2035, criminal, a manifest error hath happened, to the great damage of the said United States of America as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, Washington, District of Columbia, together with this writ, so that you have the said record and proceedings aforesaid at the city of Washington, D. C., and filed in the office of

the clerk of the United States Supreme Court in Washington, District of Columbia, on or before the 2nd day of February, 1921, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 3rd day of January, in the year of our Lord one thousand nine hundred and twenty-one.

Issued at office in Oklahoma City, Oklahoma, with the seal of the District Court of the United States for the Western District of Oklahoma and dated as aforesaid.

[SEAL.] ARNOLD C. DOLDE,
Clerk of the District Court of the United States,
Western District of Oklahoma.

Allowed by—
JOHN H. COTTERAL, *Judge.*

UNITED STATES OF AMERICA,
Western District of Oklahoma, ss:

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of the District Court of the United States for the Western District of Oklahoma.

[SEAL.] ARNOLD C. DOLDE,
Clerk of the District Court of the United States,
Western District of Oklahoma.

Filed Jan. 3, 1920. Arnold C. Dolde, clerk, by M. V. Haws, deputy.

3 In the District Court of the United States for the Western District of Oklahoma.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
A. Z. HUTTO AND D. A. RYAN, DEFENDANTS. } No. 2035. Crim.

INDICTMENT FOR CONSPIRACY TO VIOLATE SECTION 2078, REVISED STATUTES, IN VIOLATION OF SECTION 37 OF THE FEDERAL PENAL CODE.

At a special term of the District Court of the United States for the Western District of Oklahoma, begun and held at the city of Oklahoma City in said district on the fifteenth day of September, in the year of our Lord one thousand nine hundred nineteen, the

grand jurors of the United States of America, within and for said district, having been duly summoned, empanelled, sworn, and charged to inquire into and true presentment make of all public offenses against the laws of the United States of America, committed within said district, in said State of Oklahoma, upon their oaths aforesaid, in the name and by the authority of the United States of America, do find and present:

4 That heretofore, to wit, on or about the first day of September, in the year of our Lord one thousand nine hundred seventeen, under and by virtue of an act of Congress approved April thirtieth, in the year of our Lord one thousand nine hundred eight, defendant A. Z. Hutto was appointed by the Commissioner of Indian Affairs, Indian farmer for the Tonkawa Tribe of Indians, Ponca Reservation, in Oklahoma, and on said date duly qualified as such Indian farmer, and continued to act as such Indian farmer from and after said date up until some time during the month of April, nineteen hundred nineteen;

That in pursuance of said act of Congress approved May 30th, 1908, the Secretary of the Interior issued, promulgated, and published rules and regulations covering the duties of the Indian farmers; that under and by virtue of said act of Congress and said rules and regulations, it thereby became and was the duty of said Indian farmer to superintendent and direct forming and stock raising among the said Tonkawa Tribe of Indians, Ponca Reservation, in Oklahoma, and to supervise the leasing of Indian lands, and to appraise their value for sale, and to make such reports as required by the Commissioner of Indian Affairs, the Secretary of the Interior, and the superintendent of the said Ponca Reservation;

That heretofore, to wit, continuously and at all times throughout the period of time extending from the first day of September, nineteen hundred seventeen, to on or about the fifteenth day of April, nineteen hundred nineteen, at and within the county of Kay, State of Oklahoma, in the Western District thereof, A. Z. Hutto and D. E. Ryan, whose more full, true, and correct names are to the grand jurors unknown, then and there being, did then and there wilfully, knowingly, unlawfully, and feloniously conspire, confederate, combine, and agree together and with each other and with divers other persons to the grand jurors unknown, that the said A. Z. Hutto, while so em-

5 ployed in Indian affairs, should have an interest and concern in certain trades with the Indians, which certain trades with the Indians were not for or on account of the United States, in violation of section 2078, Revised Statutes of the United States—that is to say, that the said A. Z. Hutto and D. E. Ryan did then and there wilfully, knowingly, unlawfully, and feloniously combine, confederate, and agree together and with each other and with divers other persons to the grand jurors unknown, that the said A. Z. Hutto, while so employed as Indian farmer should have an interest and concern in sales and purchasing of automobiles and other com-

modities by said Indians, and that as part and parcel of said conspiracy, the said A. Z. Hutto and D. E. Ryan, well knowing all of the premises aforesaid, did then and there knowingly, wilfully, unlawfully, and feloniously conspire, combine, confederate, and agree together and with each other, and with divers other persons to the grand jurors unknown, that they would and should persuade, induce, procure, and cause certain Indians, members of said Tonkawa Tribe of Indians in Oklahoma, to wit, Railroad Cisco, Robert Tay, and divers other Indians, members of the Tonkawa Tribe of Indians in Oklahoma, whose names are to the grand jurors unknown, to purchase automobiles and other commodities and that the said A. Z. Hutto should have an interest and profit in said sales and purchases.

Overt acts.

(1) And the grand jurors aforesaid, upon their oaths aforesaid, and in the name and by the authority of the United States of America, do further find and present:

That in pursuance of said unlawful conspiracy, combination, confederation, and agreement as aforesaid, and to effect the object of the same, and while the same was still in existence, and in pursuance of the execution thereof, the said A. Z. Hutto and D. E. Ryan did, in said county of Kay and State of Oklahoma, and in the Western District thereof, on or about the twentieth day of August, in the year of our Lord one thousand nine hundred and eighteen,
6 solicit and induce the said Indian, Railroad Cisco, to purchase an automobile from the said D. E. Ryan, for the excessive and unreasonable consideration of one thousand eighteen hundred and fifty ($1,850.00) dollars, and in pursuance further of said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, and while the same was still in existence, and in pursuance of the execution thereof, the said D. E. Ryan, did in said county of Kay and State of Oklahoma and in the Western District thereof, on or about the said 20th day of August, 1918, pay to A. Z. Hutto, said defendant, the sum of one hundred ($100.00) dollars, for his services in procuring the consent of the said Railroad Cisco to the said purchase of said automobile;

(2) And the grand jurors aforesaid, upon their oaths aforesaid, and in the name and by the authority of the United States of America, do further find and present:

That in pursuance of said unlawful conspiracy, combination, confederation, and agreement as aforesaid, and to effect the object of the same, and while the same was still in existence, and in pursuance of the execution thereof, the said A. Z. Hutto and D. E. Ryan, did, in said county of Kay and State of Oklahoma, and in the Western District thereof, on or about the twentieth day of August, in the year of our Lord one thousand nine hundred eighteen, solicit and induce the said Indian, Robert Tah, to purchase an automobile from the said D. E. Ryan, for the excessive and unreasonable con-

sideration of one thousand eight hundred fifty ($1,850.00) dollars, and in pursuance further of said unlawful conspiracy, combination, confederation and agreement aforesaid, and to effect the object of the same, and while the same was still in existence, and in pursuance of the execution thereof, the said D. E. Ryan did, in said county of Kay and State of Oklahoma and in the Western District thereof, on or about the said 20th day of August, 1918, pay to A. Z. Hutto, said defendant, the sum of one hundred ($100.00) dollars, for his services in procuring the consent of the said Robert Tah to the said purchase of said automobile;

7 Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

FRANK E. RANSDELL,
Assistant United States Attorney.

Witnesses:
ROBERT TAH.
RAILROAD CISCO.
CLYDE SUTTON.
Mrs. SUSIE ALLEN.

(Endorsed:) No. 2035. United States District Court, Western District of Oklahoma. The United States vs. A. Z. Hutto and D. A. Ryan. Indictment for conspiracy to violate section 2078, Revised Statutes, in violation of section 37 of Federal Penal Code. A true bill. M. C. Main, foreman grand jury. Returned and filed in open court Sept. 25, 1919. Arnold C. Dolde, clerk.

8 In the United States Court in and for the Western District of the State of Oklahoma.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
A. Z. HUTTO, DEFENDANT. } No. 2035.

DEMURRER OF A. Z. HUTTO.

Now comes the defendant and demurs to the indictment filed against him in the above designated cause and for grounds therefor states:

1st. That said information does not substantially conform to the requirements of the Constitution and laws of the United States.

2nd. That the facts and allegations in said indictment contained are not sufficient to charge the commission of a public offense.

3rd. That the allegations and statements in said indictment seek to charge more than one offense.

4th. That the statements and allegations contained in said indictment are not sufficient to charge this defendant with a public offense.

5th. That said indictment is not direct and certain in regard to the offense therein sought to be charged, nor is said indictment direct and certain as to the particulars of such offense sought to be charged against this defendant.

6th. That said indictment is not direct and certain in regard to the particulars, the facts, and the circumstances of the offense or offenses therein sought to be charged, although such facts, particulars, and circumstances are necessary and essential to the charging of a complete offense against this defendant.

7th. That the acts charged and the facts alleged in the indictment to constitute an offense committed by the defendant are not clearly and distinctly set forth in ordinary and concise language in such manner as to enable a person of common understanding to know what is therein intended.

8th. That neither the acts charged as constituting the offense set out in the indictment nor those allegations stated therein alleged with that degree of certainty which would enable a court to pronounce judgment according to the right of the cause or to protect the defendant in bar of another prosecution or action thereupon nor upon some of the offenses included within the general charge therein contained.

9th. The grounds of demurrer hereinbefore stated are each separately ad severally alleged and urged as applicable to each separate count in said indictment as though set out and herein repeated as to each count separately.

SULLIVAN & HILL,
HENRY S. JOHNSTON,
Attorneys for Defendant.

(Endorsed:) Filed Dec. 7, 1920. Arnold C. Dolde, clerk, by Frank T. McCoy, deputy.

9 In the District Court of the United States for the Western District of Oklahoma.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
A. Z. HUTTO AND D. A. RYAN, DEFENDANTS. } No. 2035. Criminal.

ORDER ON DEMURRER TO INDICTMENT.

On this seventh day of December, 1920, the separate demurrer of A. Z. Hutto to the indictment herein is argued and submitted, and the court being fully advised, it is

Ordered, that said demurrer be and it is sustained, upon the ground that section 2078 of the Revised Statutes is held inapplicable to transactions involving property with respect to which the Government has no interest or control, and no such interest or control is alleged in the indictment.

It is thereupon ordered and adjudged that said defendant be and he is discharged herein, and go hence without day.

To which order and judgment and each of them the plaintiff excepts; and said exceptions are duly allowed.

JOHN H. COTTERAL,
District Judge.

(Endorsed:) Filed Dec. 7, 1920. Arnold C. Dolde, clerk.

10 In the District Court of the United States for the Western District of Oklahoma.

PETITION FOR WRIT OF ERROR.

UNITED STATES OF AMERICA, PLAINTIFF, plaintiff in error, *vs.* A. Z. HUTTO, DEFENDANT. } No. 2035.

Now comes the United States of America, by its attorneys, Herbert M. Peck, United States district attorney for the Western District of Oklahoma, and Frank E. Ransdell, assistant United States attorney for the Western District of Oklahoma, and complains that in the record and proceedings had in this cause and in the judgment sustaining the defendant's demurrer to the indictment found herein against said A. Z. Hutto, on September 25, 1919, and dismissing said indictment, manifest error hath happened, as will appear in the assignment of errors herewith submitted.

Wherefore the United States of America prays for an allowance of a writ of error and for such other orders and processes as may cause the same to be corrected by the Supreme Court of the United States.

Dated this 3rd day of January, 1921.

HERBERT M. PECK,
United States Attorney for the Western District of Oklahoma,
FRANK E. RANSDELL,
Assistant United States Attorney for the Western District of Oklahoma,
Attorneys for Petitioner.

(Endorsed:) Filed Jan. 3, 1921. Arnold C. Dolde, clerk, by M. V. Haws, deputy.

11 In the District Court of the United States for the Western District of Oklahoma.

ASSIGNMENT OF ERRORS.

UNITED STATES OF AMERICA, PLAINTIFF, plaintiff in error, *vs.* A. Z. HUTTO, DEFENDANT. } No. 2035.

The United States of America, in connection with its petition for a writ of error, makes the following assignment of errors, which, it

avers, occurred in the decision of the court herein, sustaining the demurrer to the indictment found herein on September 25, 1919, against A. Z. Hutto:

I.

The court erred in sustaining the demurrer to the indictment.

II.

The court erred in not overruling the demurrer to the indictment.

III.

The court erred in holding as a matter of law that the indictment was insufficient in law.

IV.

The court erred in its construction of section 2078 of the Revised Statutes of the United States.

12 V.

The court erred in its interpretation of said section 2078 of the Revised Statutes of the United States.

VI.

The court erred in its decision in deciding that section 2078 of the Revised Statutes is inapplicable to transactions involving lands or other property with respect to which the Government has no interest or control and in sustaining the demurrer to the indictment because no such interest or control was alleged in the indictment.

VII.

The court erred in its decision in holding and deciding that the indictment was insufficient in law because it was not alleged that the Government had an interest or control in the transactions involving lands or other property mentioned in the indictment.

VIII.

The court erred in its decision in holding and deciding that the indictment did not charge facts sufficient to constitute an offense against the laws of the United States.

And the United States aforesaid, plaintiff in error, prays that the judgment entered herein sustaining the demurrer to the indictment,

for the errors aforesaid and other errors in the record and proceedings herein, may be reversed and altogether held for nothing, and that the plaintiff in error may be restored to all things that it has lost by reason of said judgment, and that the District Court of the
13 United States for the Western District of Oklahoma be directed to vacate and set aside said judgment and compel the defendants in error to plead to said indictment.

This 3rd day of January, 1921.

HERBERT M. PECK,
United States Attorney in and for the Western District of Oklahoma.
FRANK E. RANSDELL,
Assistant United States Attorney in and for the Western District of Oklahoma.

(Endorsed:) Filed Jan. 3, 1921. Arnold C. Dolde, clerk, by M. V. Haws, deputy.

14 In the District Court of the United States for the Western District of Oklahoma.

ORDER ALLOWING WRIT OF ERROR.

UNITED STATES OF AMERICA, PLAINTIFF, PLAINTIFF IN *v.* error, A. Z. HUTTO, DEFENDANT.	No. 2035.

This 3rd day of January, 1921, came the United States, plaintiff in the above-entitled cause, by Herbert M. Peck, United States attorney, and Frank E. Ransdell, assistant United States attorney, and filed herein and presented to the court its petition praying for an allowance of a writ of error in said cause to be urged by it, and that a transcript of the record and proceedings and papers upon which the judgment in said cause was rendered may be sent to the Supreme Court of the United States of America, and having accompanied said petition with assignment of errors as required by law, upon consideration whereof, the court does allow the writ of error.

JOHN H. COTTERAL,
Judge.

(Endorsed:) Filed Jan. 3, 1921. Arnold C. Dolde, clerk, by M. V. Haws, deputy.

15 In the District Court of the United States for the Western District of Oklahoma.

PRÆCIPE FOR RECORD.

UNITED STATES OF AMERICA, PLAINTIFF, PLAINTIFF IN error,
v.
A. Z. HUTTO, DEFENDANT. } No. 2035.

To the clerk of the District Court of the United States for the Western District of Oklahoma:

You will please prepare a transcript for appeal in the above-entitled cause and include therein the following, to wit: Original citation; indictment; demurrer to indictment, journal entry of December 7, 1920; petition for writ of error; assignment of errors; order allowing writ of error; writ of error; and all other entries, orders, and pleadings in the case, if any there are.

Respectfully submitted.

HERBERT M. PECK,
United States Attorney,
FRANK E. RANSDELL,
Assistant United States Attorney,
Attorneys for Plaintiff.

(Endorsed:) Filed Jan. 3, 1921. Arnold C. Dolde, clerk, by M. V. Haws, deputy.

16 In the District Court of the United States for the Western District of Oklahoma.

ELECTION AND DESIGNATION OF RECORD.

UNITED STATES OF AMERICA, PLAINTIFF, PLAINTIFF IN error.
v.
A. Z. HUTTO, DEFENDANT. } No. 2035.

In the above entitled cause the plaintiff in error, the United States of America, gives notice of its election to take and file the transcript of the record herein in the appellate court, to be printed under the supervision of its clerk and under its rules.

And the said plaintiff in error designates all of the record in said cause to be printed and included in said transcript.

HERBERT M. PECK,
United States Attorney, Western District of Oklahoma,
FRANK E. RANSDELL,
Assistant United States Attorney, Western District of Oklahoma,
Attorneys for Plaintiff.

We hereby accept service of the above this 4th day of January, A. D. 1921, and acknowledge receipt of a copy thereof.

SAM K. SULLIVAN,
HENRY S. JOHNSTON,
Attorney for Defendant in Error.

(Endorsed:) Filed January 4, 1921. Arnold C. Dolde, clerk, by M. V. Haws, deputy.

17 CLERK'S CERTIFICATE TO TRANSCRIPT.

UNITED STATES OF AMERICA,
Western District of Oklahoma, ss:

I, Arnold C. Dolde, clerk of the District Court of the United States for the Western District of Oklahoma, do hereby certify the attached and foregoing to be a full, true, and complete transcript of the pleadings, record, and proceedings of said court in case No. 2035, criminal, wherein the United States of America is plaintiff and A. Z. Hutto is defendant, as full, true, and complete as the said transcript purports to contain and as called for by the præcipe for transcript and designation of the record above set forth.

I further certify that the original citation and the original writ or error are hereto attached and are returned herewith.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at office in the city of Guthrie in said district, this 13th day of January, A. D. 1921.

[SEAL.]

ARNOLD C. DOLDE,
Clerk,
By M. V. HAWS,
Deputy Clerk.

(Indorsement on cover:) File No. 28,049. W. Oklahoma D. C. U. S. Term No. 692. The United States of America, plaintiff in error, vs. A. Z. Hutto. Filed January 20th, 1921. File No. 28049.

Office of the clerk, Supreme Court, U. S. Received Jan. 20, 1921.

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